Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARTIN COUNTY, FLORIDA, Petitioner,

v.

RICHARD WOUTERS, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a court judicially rewrite the Department of Labor's long standing regulations regarding the application of the partial overtime exemption contained in Section 7(k) of the Fair Labor Standards Act to emergency medical personnel in a manner that is so inconsistent with the regulations themselves as to virtually eviscerate the 7(k) exemption for EMS personnel and which thwarts the congressional intent underlying the exemption?

LIST OF ALL PARTIES

The petitioner, Martin County, Florida, is a political subdivision of the state of Florida.

The respondents are:

Richard Wouters, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, William M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis.

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IN THE

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MARTIN COUNTY, FLORIDA, Petitioner

vs.

RICHARD WOUTERS, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner MARTIN COUNTY, FLORIDA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit for which a Petition For Rehearing was denied on February 24, 1994.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 9 F.3d 924 (CA 11 1993) and is contained in the Appendix hereto.

The decision of the District Court is reported at 793 F.Supp. 310 (S.D. Fla. 1992) and is contained in the Appendix hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Eleventh Circuit was entered on December 21, 1993. A timely petition for rehearing was filed and was subsequently denied on February 24, 1994. The instant petition for certiorari has been filed within ninety (90) days of the Court of Appeals' denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C.

§1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7(k) of the Fair Labor Standards Act ("FLSA") as amended, 29 U.S.C. §207(k), set forth in the Appendix, and the implementing regulations, 29 C.F.R. §§553.210-553.215, set forth in the Appendix.

STATEMENT OF THE CASE

A. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

At the time this suit was instituted the respondents, plaintiffs below, were current or former Emergency Medical Services ("EMS") personnel working for Martin County's Department of Public Safety as either Paramedics ("PMs") or Emergency Medical Technicians ("EMTs").

While the Eleventh Circuit did

remand the case for further factual development, the petitioner submits that a determination of what facts are necessary and relevant on remand hinges on the proper resolution of the legal issues raised in the instant Petition. The overarching legal issue which merits certiorari consideration is the Court of Appeals' determination of what constitutes "exempt" and "non-exempt" work for purposes of applying a partial overtime exemption contained in the FLSA to emergency medical personnel. The following description of Martin County's emergency response system, which is set out in the Eleventh Circuit's Opinion, is helpful in understanding and placing in context the precise legal issue involved.

The Martin County Department of Public Safety is responsible for, inter

alia, providing a variety of emergency services to the citizens of Martin County, Florida. Two major components of the Department's emergency response system are firefighters and the EMS personnel. The Department has no law enforcement component.

EMS personnel provide emergency treatment to victims of fires, accidents, crimes, hazardous materials incidents, natural disasters and a variety of medical crises. They do not handle routine matters like patient transfers. All working hours are dedicated to emergency response, vehicle or equipment maintenance, training, facility housekeeping, or being available at the station for dispatches to emergencies. EMS personnel do not perform duties unrelated to their EMS work.

Firefighters and EMS personnel possess different skills. EMS personnel are not necessarily firefighters. However, nearly all firefighters are certified EMTs, trained in extrication techniques, and basic life saving and support procedures. Paramedics have EMT training, but are also certified to administer Advanced Life Support ("ALS"). Because pursuant to Florida law neither firefighters nor EMTs may conduct ALS functions, paramedics are regularly jointly dispatched to certain fire protection emergencies. EMTs are also automatically dispatched to these calls because they work in teams with paramedics.

The instant case involves application of the "7(k)" exemption to individuals who function exclusively as EMTs or PMs.

B. COURSE OF PROCEEDINGS IN THE *DISTRICT COURT*

The respondents filed suit in which they alleged entitlement to overtime compensation for all hours worked in excess of forty per week pursuant to Section 7(a) of the FLSA.

Martin County has paid the respondents in accordance with 29 U.S.C. §207(k) ("7(k)") which is a partial exemption to the general overtime pay requirements of the FLSA. 7(k) and its implementing regulations, 29 C.F.R. §§553.210 et seq., contained in the Appendix hereto, create a partial overtime exemption for fire protection, law enforcement and certain ambulance and rescue service personnel. In its simplest terms, the exemption provides that fire protection and law enforcement personnel receive an overtime premium for hours worked in excess of 53 and 43

hours per week respectively. In its regulations implementing the statutory exemption, the Department of Labor ("DOL") provided that certain emergency medical and rescue personnel were also included in the exemption.

The United States District Court for the Southern District of Florida, the honorable Jose A. Gonzalez, Jr., granted Martin County summary judgment on May 14, 1992.

The District Court addressed inter alia the applicability of the so-called "20% Rule" found in 29 C.F.R. §553.212, Appendix p. 41a, which provides that an employee covered by 7(k) may also engage in certain nonexempt work. Such work will not defeat the 7(k) exemption unless the work exceeds 20% of the employee's work during the applicable period. In deciding what constitutes

"exempt" work for purposes of the 20% rule the lower court held that exempt activity involved all duties of the respondents which were incident to ambulance and rescue service. Judge Gonzalez rejected the respondents' argument that any activity that is not directly related to a dispatch to a fire or accident scene constitutes nonexempt work. Because the respondents spent all of their work time in responding to emergencies or in activities incident to such emergency responses, the District Court concluded that the 20% limitation on exempt work had not been exceeded and that Martin County had properly paid the respondents in accordance with the 7(k) partial overtime exemption.

The District Court noted that a ruling that exempt work for individuals such as the respondents consisted only

of responding to fires would constitute a judicial rewriting of the DOL's regulations, specifically 29 C.F.R. §553.215.

C. COURSE OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Following the District Court's entry of summary judgment, the respondents filed a timely notice of appeal with the Eleventh Circuit Court of Appeals, invoking the court's jurisdiction pursuant to 28 U.S.C. Section 1291. As noted above, on December 31, 1993 the Eleventh Circuit entered a judgment which, inter alia, vacated the District Court's order granting summary judgment and on February 24, 1994 denied Martin County's petition for rehearing. It is the Court of Appeals holding regarding what

constitutes exempt work for purposes of the 7(k) partial overtime exemption which petitioner contends merits certiorari review by this honorable Court.

PETITIONER'S POSITION BEFORE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner argued to the Eleventh Circuit, as it had to the District Court, that the DOL's applicable regulations provide that three different types of primary job duties are included in the 7(k) exemption, to wit: (1) fire protection activities; (2) law enforcement activities; (3) emergency ambulance and rescue activities. Thus in determining what constitutes exempt work for purposes of the 7(k) exemption it is necessary to look to the type of activity which brings an individual

within 7(k) in the first instance. Simply stated, emergency ambulance and rescue employees such as the respondents come within the 7(k) exemption not because they have firefighting skills but because of their emergency ambulance and rescue medical skills. To require that such personnel spend at least 80% of their work time engaged in firefighting activities runs afoul of the DOL's long-standing regulations, fails to give full force and effect to all relevant portions of the Department's regulations, and is contrary to the Congressional intent underlying the exemption.

REASONS FOR GRANTING CERTIORARI

1. The Decision Below Conflicts With Prior Decisions Of This Court Regarding The Deference To Be Accorded Agency Regulations.

It is a well-established principle that federal agency regulations are to be given considerable judicial deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Indeed, when, as is true here, the regulation has remained consistent over a long period of time it is to be given "special deference". EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600, fn. 17 (1981). Contrary to this Court's teachings, the Eleventh Circuit's opinion granted no deference to the DOL's long-standing relevant regulations and the DOL's opinion letters and in essence rewrote a portion of the regulations.

The relevant regulations set forth two separate and distinct situations in which individuals who are not firefighters but who work in conjunction with firefighters to provide emergency medical services, such as the respondents here, come within the 7(k) exemption: (1) if the individuals form an integral part of the public agency's fire protection activities, 29 C.F.R. §553.210; or (2) if their services are substantially related to such activities. 29 C.F.R. §553.215(a).

These regulations were issued by the DOL shortly after the 1974 amendments to the FLSA which extended the Act to public employers, 39 Fed. Reg. 44,142 (1974) (codified at 29 C.F.R. Part 553), and have remained unchanged since they were first promulgated in 1974.

The regulations, at 29 C.F.R. §553.215(a) state:

> Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b) (20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties and (2) the ambulance and rescue service employees are <u>regularly dispatched</u> to fires,crime scenes, riots, natural disasters and accidents. (emphasis added)

The regulations do not specify any numerical test for determining "regular" dispatch and the DOL has disavowed any specific mathematical formula for determining regular dispatch. <u>See</u>, e.g. DOL Letter Ruling of October 9, 1987, Appendix pp. 45a.

The Eleventh Circuit's holding in the instant case regarding what constitutes exempt work, however, rewrites the foregoing regulatory provision to, in essence, require that emergency medical personnel spend 80% of their time responding to fires in order to qualify for the 7(k) exemption. This is so because the Eleventh Circuit specifically held that "medical emergency hours and time spent at accident scenes unrelated to automobiles" constitutes nonexempt work. Wouters, 9 F.3d 924, 932. Such an analysis of exempt work is directly contrary to the Department's carefully crafted regulatory scheme. 29 C.F.R. §553.215 already factors into the analysis the fact that ambulance and rescue service personnel perform both fire and non-fire related duties and the

regulation extends the exemption to only such personnel who are "regularly" dispatched to fires. The DOL, pursuant to its Congressional mandate and in light of its administrative expertise in implementing the FLSA, set forth only one "frequency" criterion for applying the 7(k) exemption to ambulance and rescue service personnel such as the respondents, i.e. they be regularly dispatched to fires, etc. The Eleventh Circuit 's imposition of a second frequency criterion under the guise of defining exempt and non-exempt work not only fails to accord the requisite deference to the DOL's regulations, but constitutes an impermissible rewriting of the regulations of such magnitude as to virtually eviscerate the exemption for EMS personnel.

The Eleventh Circuit additionally

rewrote the relevant regulations by holding that "... time spent at accident scenes unrelated to automobiles" (emphasis added) is nonexempt work under 7(k). Wouters, at 932. This judicially-created requirement that only responses to automobile accidents, rather than responses to all "accidents", constitute exempt work is not only unsupported by the DOL's regulations but is directly contrary to them. As previously noted, 29 C.F.R. §553.215(a) sets forth a two-part test for determining 7(k) coverage for certain ambulance and rescue service personnel. The regulations state in pertinent part that these individuals come within 7(k) if they (1) "have received training in the rescue of fire, crime, and accident victims ...," and (2) "are regularly dispatched to fires,

crime scenes ... and accidents", (emphasis added). Nowhere in the DOL regulations is the term "accidents" limited solely to automobile accidents. Had the Department intended such a limitation it would have been a simple matter to so state in the regulation. However, the Department did not do so but rather drafted regulations which recognize the fact that EMS personnel respond to a wide variety of emergencies which include fires, crimes and accidents of all types.

Martin County submits that the Department of Labor's regulatory frame work, in contrast to the Eleventh Circuit's approach, is both consistent with the congressional intent underlying

the 7(k) exemption [1./] and the realities faced by public employers in providing emergency services. Congress was concerned with the substantial fiscal impact on public employers if they were required to pay an overtime premium to emergency workers for all hours over forty in a week. Public employers such as Martin County, and its taxpayers, who have established a highly integrated inter-dependent emergency response team, and who are fortunate enough to have relatively few fires, are faced with drastic alternatives under the Eleventh Circuit's reasoning.

1./ "Congress established these special provisions [7(k)] in recognition of the special needs of governments in the area of public safety and the unusually long hours that public safety employees must spend on duty" Report of the Senate Committee on Labor and Human Resources, S. Rep. No. 99-159, 99th Cong. 1st Sess., reprinted in 1985 U.S. Code Cong. & Ad. News 651, 653.

The first such alternative would be to restrict the activities of the respondents solely to fire response and hire another large number of EMTs and PMs to respond to all of the other emergencies that arise in the County. This latter group would be entitled to an overtime premium for all hours worked in excess of 40 hours per week. Because of the need to provide such emergency service 24 hours per day, 365 days per year the County would need to hire even more personnel to have sufficient staffing to avoid scheduling overtime or be forced to pay large sums in overtime compensation. Another alternative is to continue the current integrated system of providing emergency services to the citizens of Martin County and pay an overtime premium for all hours worked in excess of 40 per week with the attendant

fiscal impact. Such a scenario would lead to the anomalous situation in which a firefighter and one of the respondents could be working side-by-side in response to an emergency, both in their 41st hour of work for the week, and the paramedic would be due an overtime premium for the response while the firefighter would not. A final, draconian alternative is for the County to simply stop providing emergency medical and rescue services altogether.

It is obvious from the statutes and regulations that Congress and the DOL were concerned about striking a balance between the newly-imposed FLSA coverage for public employees and the fiscal impact on taxpayers the payment of an overtime premium to emergency workers would have. The Eleventh Circuit's rewriting of the regulations upsets that

balance and leads precisely to the type of fiscal impact Congress sought to ameliorate.

2. The Decision Below Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The Eleventh Circuit's opinion in this case was the Circuit's third decision in less than a year on the issue of the applicability of the 7(k) exemption to emergency medical personnel. The Court's opinion adopted the reasoning set forth in Spires v. Ben Hill County, 980 F.2d 683 (11th Cir. 1993) and O'Neal v. Barrow County Bd. of Com'rs, 980 F.2d 674 (11th Cir. 1993). As of this date two other Courts of Appeals have addressed the issue, namely the Fifth Circuit in Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991) and the Sixth Circuit in the very recent

case of Justice v. Metro Govt. of Nashville, 4 F.3d 1387 (6th Cir. 1993). In addition to these appellate decisions, the issue has been addressed by a number of United States District Courts. See, inter alia, Nalley v. Mayor of Baltimore, 796 F. Supp. 194 (D. Md. 1992); Horan v. King County, Wash., 740 F. Supp. 1471 (W.D. Wash. 1990); McKittrick v. City of Chicago, Ill., No. 90 C 3945, 1992 WL 77728 (N.D. Ill., April 3, 1992). As is evidenced by the foregoing citations, the applicability of the 7(k) exemption to EMS personnel is a recurring, albeit very recent issue, the judicial development of which is in its early stages.

The petitioner respectfully submits that the instant case affords this Court the opportunity to address an issue that has nationwide implications, both fiscal

and otherwise, for public employers and taxpayers, at a relatively early stage in the litigation of the issue. By addressing this issue now rather than awaiting further appellate decisions, the Court can preclude the possibly erroneous expenditure of an obviously substantial amount of taxpayer dollars. Such an erroneous expenditure would arise if public employers restructured the operation and pay plans of their emergency response units in light of the Eleventh Circuit's rulings and it were later to be determined that the Eleventh Circuit view was not correct.

Further, by addressing this issue now, the Court can greatly reduce the prospect of expensive, piecemeal litigation, with the attendant drain on tax dollars, that is inherent in the Eleventh Circuit's approach. Under the

Eleventh Circuit's reasoning regarding exempt work, litigation of these types of cases will, of necessity, devolve into a protracted, microscopic analysis of every minute of every working hour of emergency personnel.

Also, the instant case provides an opportunity for the Court to give guidance on the issue to District Courts around the country. It should be noted that in all but one of the Court of Appeals decisions on this issue cited above, the decision of a District Court was reversed. Clearly, there is a good deal of uncertainty among the courts on this matter. By addressing the issue now, this Court can resolve that uncertainty and obviate or at least lessen the need for years of litigation and the attendant expenditure of limited judicial resources and the litigants'

time and money.

Finally, the County submits that the Eleventh Circuit's opinion calls into question the continued viability of the 7(k) exemption even for certified firefighters. The opinion's overly restrictive interpretation of exempt work ignores the ever-expanding role of a firefighter who responds to matters such as hazardous materials incidents, water evacuation and medical assists. [2./] If the court's decision is left unreviewed, it could have a devastating

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2./ "... departments now provide a multiplicity of services beyond fire suppression, ranging from emergency medical to building plan reviews to public education programs. In more and more cases the title of fire department does not even come close to describing the services provided for the community." (Preface, Managing Fire Services, Second Edition, International City Management Association (1988)).

fiscal and operational impact on even the provision of fire protection services throughout the country. This is so because arguably under the Eleventh Circuit's reasoning every time a certified firefighter performs emergency medical work as part of his or her emergency response function, he or she is engaging in nonexempt work. Clearly such a drastic result was not intended by Congress in enacting 7(k) nor by the Department of Labor in promulgating the relevant regulations.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 92-4557

Richard WOUTERS, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, Willlilam M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis,

Plaintiffs-Appellants,
Cross-Appellees,

v.

MARTIN COUNTY, FLORIDA,

Defendant-Appellee,
Cross-Appellee.

Dec. 21, 1993

Emergency medical technicians (EMTs) and paramedics sued to recover overtime pay under the Fair Labor Standards Act (FLSA), and county defended on the theory that plaintiffs qualified for overtime exemption. On parties' cross motions for summary judgment, the United States District Court for the Southern District of Florida, No. 91-14047-Civ-JAG, Jose A. Gonzalez, Jr., J., 793 F.Supp. 310, entered summary judgment in favor of county, and plaintiffs appealed. The Court of Appeals, Fay, Circuit

Judge, held that: (1) material questions of fact, whether emergency medical rescue personnel that worked in conjunction both with firefighters and police were exempt from overtime pay requirements of the FLSA either as firefighters or as law enforcement officers, precluded entry of summary judgment, but (2) dismissal of some of the plaintiffs from case was not appropriate sanction for their discovery abuses.

Reversed, vacated and remanded.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and CARNES, Circuit Judges and JOHNSON, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiffs, employees of the Martin County Department of Public Safety, appeal the district court's dismissal of several plaintiffs, denial of their motion for partial summary judgment, and grant of summary judgment in favor of defendant Martin County on the employees' suit to recover overtime compensation allegedly due to them under the Fair Labor Standards Act of 1938[1] ("FLSA"). We REVERSE the order of dismissal as to fourteen plaintiffs, VACATE the order granting summary judgment, and REMAND for further consideration.

I. BACKGROUND

A. Facts

Plaintiffs are current or former Emergency Medical Services ("EMS") personnel, working as either paramedics ("PMs") or Emergency Medical Technicians ("EMTs"). Their suit alleges entitlement to overtime compensation

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[1] 29 U.S.C. §§ 201-219 (1988).

for all hours worked in excess of forty per week, pursuant to the FLSA section 7(a). Alternatively, plaintiffs claim that if, as argued by defendant, they fall under any exemption provided by the Act, it should be that for law enforcement officers, entitling them to overtime after forty-three hours of work per week.

Instead, defendant classifies plaintiffs as firefighters who fall under the exemption found in the FLSA section 7(k) and are entitled to overtime only after working fifty-three hours in a week. Simultaneously, defendant argues that plaintiffs spend all their time providing emergency medical rescue services, and this work qualifies as law enforcement *and* fire protection activity under section 7(k) of the FLSA. (R.V5-90-8).

Firefighters and EMS personnel comprise the county's emergency response system. EMS personnel work in eleven paramedic stations located throughout the County and in six of the fourteen county fire stations. Typically, plaintiffs respond to emergencies in their assigned ambulances. At one fire station, the paramedic rides to emergencies on the fire truck. Plaintiffs' shifts match the "twenty-four hours on, forty-eight hours off" schedule followed by firefighters.[2]

EMS personnel provide emergency treatment to victims of fires, accidents, crimes, hazardous materials incidents, natural disasters and a variety of medical crises. They do

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[2] Because the "24-on/48-off" schedule does not easily equate to a typical forty hour work week, the County calendars both EMS personnel and firefighters on a twenty-one day work period. During a complete cycle, both sets of employees work 168 hours and are paid overtime for nine of those hours. If EMS personnel were awarded overtime after working forty-three hours per week, like police officers, they would be entitled to thirty-nine hours of overtime in each twenty-one day work period. If they were treated as non-exempt employees under section 7(a), plaintiffs would be entitled to forty-eight hours of overtime in each work period.

not handle routine matters like patient transfers. All working hours are dedicated to emergency response, vehicle or equipment maintenance, training, facility housekeeping, or being available at the station for dispatches to emergencies. EMS personnel do not perform duties unrelated to their EMS work.

Firefighters and EMS personnel possess different skills. EMTs and PMs are not necessarily firefighters. However, nearly all firefighters are certified EMTs, trained in extrication techniques, and basic life saving and support procedures. Paramedics have EMT training, but are also certified to administer Advanced Life Support ("ALS").[3] Because neither firefighters nor EMTs may conduct ALS functions, paramedics are regularly jointly dispatched to certain fire protection emergencies. EMTs are also automatically dispatched to these calls because they work in teams with paramedics. Defendant asserts that the county's emergency response effectiveness depends on joint action by the various components of the system.

Defendant maintains computerized records on the frequency and nature of calls answered by firefighters and EMS units, and relies on the figures for *firefighter* responses from 1989 to 1991 in presenting its case. Although defendant maintains that firefighters and EMS personnel may work jointly on many types of calls, the only dispatches that are "clearly joint response" are those involving structure fires, vehicle accidents, and medical assists.[4] (Wolfberg Aff. at 7-8). Based on these figures, Defendant asserts that over half of the 4648 legitimate firefighters calls during the target years were joint re-

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[3] Pursuant to Fla.Stat. § 401.23(1) (1993), Advanced Life Support functions include administering drugs and intravenous fluids, and performing cardiac defibrillation.

[4] The term "medical assists" is not further explained. The EMS "Total Runs by Units" computer printout lists in excess of twenty types of calls that might be considered medical assists.

sponses with EMS workers.[5] The same affiant who provided this explanation of the computer printouts said in deposition that "routine dual responses" also occur for hazardous materials situations and aircraft standby calls. These two additional categories add only seventy-three joint dispatches for 1989, ten for 1990, and fourteen for 1991. The County agrees that approximately 20% of all EMS calls during the target years were unrelated to fire calls. (Wolfberg Depo. at 74.)

Plaintiffs also use the county's computer printouts but focus on the figures for *EMS* dispatches. EMS personnel responded to 26,647 calls from 1989 through 1991. Plaintiffs' calculations result in far higher estimates of non-firefighter related EMS calls than one derives from defendant's figures.[6] One method of calculation accepts the county's focus on the firefighter call breakdown, adding firefighter calls to structure fires, medical assists, vehicle accidents, hazardous situations, and aircraft standbys. This yields a total of 7440 routine EMS dispatches with firefighters. If divided by the total number of EMS calls, even this methodology suggests that only 27.92% of all EMS calls were routine dispatches with firefighters. Thus, ac-

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[5] The County points out that from 1989 through 1991, approximately 57% of all *firefighter* calls were joint responses with EMS personnel. This figure does not, without more, further the inquiry of whether EMS employees are more like firefighters or police officers, or are non-exempt personnel as they claim. Instead, it sheds light on the nature of the firefighter position.

[6] The computer printout on EMS calls places dispatches into forty-three categories. These categories do not match the fifty-two categories reflected on the firefighter printout. The parties' "battle over numbers" is in large part caused by disparities in the call classification schemes, neither of which exactly matches the statutory language at issue. By focusing exclusively on the EMS records, Plaintiffs suggest that when viewed in the light most favorable to the county, dual response during the three reported years occurred in approximately twenty-seven percent of all EMS calls, and when viewed in the light most favorable to plaintiffs, occurred in merely 3.6% of EMS dispatches.

cording to plaintiffs, 72.08% of the work performed by EMTs falls outside the fire protection category.

EMS dual response with police officers takes place for automobile accidents, stabbings, rapes, poisonings, suicide attempts, drownings, gunshot wounds, assaults, dead persons, mentally ill persons and overdoses. (Wolfberg Depo. at 51.) From 1989 through 1991, there were 5872 such calls, representing 22.03% of all EMS dispatches. The total number of police dispatches to these calls was not in the record.

Neither party clearly addresses the percentage of EMS calls handled alone, that is, without either police or fire dispatch. We note that by combining the police co-response figure of 22.03% with the firefighter co-response figure of 27.92%, we reach a figure of 49.95% of all EMS calls involving routine dispatch to either police or fire activity. Consequently, it appears that EMS personnel function autonomously in 50% of their calls.[7]

Before this litigation, plaintiffs and firefighters were assigned to different divisions; they were subsequently placed in a single Emergency Services Division. EMS personnel and firefighters belong to different unions and have different retirement plans. Different radio frequencies serve the two groups. The record does not reflect whether these dispatch channels emanate from a shared dispatch center.

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[7] These EMS dispatches apparently fall into discrete medical assist categories including: abdominal pains, allergic reactions, amputations, aneurysm, asthma, back pain, cardiac, choking, stroke, diabetic, electrical shock, GI bleeds, head injuries, heat injuries, musculoskeletal, ob/gyn, poison, respiratory, seizures, and trauma. Although the parties did not address it, police officers may be routinely dispatched to many of these calls as well, on the theory that any professional trained in first aid might be able to provide help. All police officers in Florida receive a minimum of forty-two hours basic training in medical first responder, which includes C.P.R. certification. Florida Criminal Justice Standards and Training Commission Law Enforcement Basic Academy Curriculum, developed pursuant to Fla.Stat. § 943.12(5) (1993).

Nor does the record reflect whether *police* and EMS employees belong to the same union or benefit from shared radio dispatch facilities or frequencies. The record further fails to clarify whether EMS employees' radios can reach firefighter or police channels although transmissions are separate, or the significance of each of these possible links between EMS, police, and firefighter services.

B. Procedural History

During discovery the district court determined that fourteen plaintiffs failed to properly respond to interrogatories despite two court orders directing their compliance. Defendant eventually obtained the answers during plaintiffs' depositions. The court dismissed these plaintiffs from the suit pursuant to defendant's motion for sanctions under Fed.R.Civ.P. 37(b)(2)(C).

Plaintiffs filed a motion for partial summary judgment as to liability, and defendant filed a motion for summary judgment. The district court granted defendant's motion finding that as a matter of law the County did not violate the overtime exemption found in 29 U.S.C. § 207(k). *Wouters v. Martin County,* 793 F.Supp. 310 (S.D.Fla. 1992). Plaintiffs allege that the district court erred because (1) the material facts do not show that the paramedics were properly classified under the firefighter exemption; (2) even if the County was entitled to a partial overtime exemption, material facts remain in dispute regarding the type of exemption applicable, and (3) dismissing fourteen plaintiffs for failure to respond properly to interrogatories was an abuse of discretion. The county cross-appeals on the trial court's failure to rule on the issue of the "good faith" defense contained in 29 U.S.C. § 259.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo. Brown v. Crawford,* 906 F.2d 667, 669 (11th Cir.

1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2056, 114 L.Ed.2d 461 (1991). The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56 advisory committee's note). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The substantive law identifies which facts are material, and the trial judge ruling on a summary judgment motion evaluates the evidence presented by the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 254, 106 S.Ct. 2505, 2510, 2513, 91 L.Ed.2d 202 (1986). Material facts are those that might affect the outcome of the suit under the governing law. *Id.* at 248, 106 S.Ct. at 2510. The movant carries the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The court must avoid weighing conflicting evidence or making credibility determinations. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2514. We review the record and all its inferences in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). Where a reasonable trier of fact may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted).

We review dismissal of plaintiffs as a sanction for failure to comply with a discovery order under an abuse of dis-

cretion standard. *United States v. $239,500 in U.S. Currency*, 764 F.2d 771, 773 (11th Cir. 1985).

III. DISCUSSION

Under section 7(a) of the FLSA, an employer must compensate an employee at an overtime rate for all work performed in excess of forty hours during a workweek.[8] Section 7(k) provides the employer with a partial exemption for employees engaged in fire protection[9] and law enforcement[10] activities. Employers need not compensate these employees for overtime until they work fifty-three and forty-three hours per week respectively.[11] While the FLSA does not specifically address ambulance and rescue service employees working for public agencies, the Code of Federal Regulations explains that if employed by a public agency other than a fire protection or law enforcement agency, the agency may treat them like firefighting or police personnel if "their services are *substantially related* to [such] activities."[12] Services are substantially related if the ambulance or rescue personnel:

> (1) have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel in the performance of their respective duties, and (2) . . . are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.[13]

EMS personnel may also fall into the exemption for firefighters or police officers if they "form an *integral part*

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[8] 29 U.S.C. § 207(a)(1) (1988).

[9] Fire protection activities are described at 29 C.F.R. § 553.210(a) (1993).

[10] Law enforcement activities are described at 29 C.F.R. § 553.211(a) (1993).

[11] 29 C.F.R. § 553.230(c) (1993).

[12] 29 C.F.R. § 553.215(a) (1993) (emphasis added).

[13] 29 C.F.R. § 553.215(a).

of the public agency's fire protection [or law enforcement] activities."[14]

Assuming a finding that the ambulance or rescue personnel fall into an exempt category, the employer may nonetheless lose the exemption through application of the "20% rule." Under this rule, an otherwise justified exemption is lost if covered employees work more than 20% of the time on nonexempt activities.[15] The requirement applies to ambulance and rescue service personnel. *O'Neal v. Barrow County Bd. of Com'rs,* 980 F.2d 674, 680-81 (11th Cir. 1993). Nonexempt work is that "which is not performed as an incident to or in conjunction with [the employees'] fire protection or law enforcement activities."[16] This Court has held that work generally benefitting the employer, which employees are required to do while not engaged in activities related to their fire protection or law enforcement duties, is nonexempt work. *Id.* at 682. Finally we note that exemptions from section 7(a) must be narrowly construed against the employer who bears the burden of proving any exemption. *Id.* at 677.

A. Does the Firefighter or Law Enforcement Standard Apply?

We take plaintiffs' second issue first, because it presents a threshold inquiry as to whether the record is sufficient to support summary judgment for either plaintiffs or defendant. Plaintiffs contend that if any section 7(k) exemption applies, it should be that for law enforcement officers, not firefighters.

Where ambulance or rescue service employees perform both fire and law enforcement activities, "the applicable

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[14] 29 C.F.R. § 553.210(a) and .211(b) (emphasis added).

[15] 29 C.F.R. § 553.212(a) (1993). The rule applies to fire protection and law enforcement personnel as described in §§ 553.210 and 553.211.

[16] 29 C.F.R. § 553.212(a).

standard is the one which applies to the activity in which the employee spends the majority of work *time* during the work period." 29 C.F.R. § 553.215(a) (emphasis added).[17] The regulation's plain language requires comparison of the number of *hours* spent in each type of activity instead of the percentage of calls falling into each classification.[18] We are mindful that this analysis may be complicated. The record shows that both police officers and firefighters respond to serious automobile accidents, and that the agency routinely dispatches EMS personnel to provide medical assistance at such scenes. Unless the cars are on fire or there is a danger of explosion, it seems likely that the EMS response is more directly connected to the law enforcement function than to firefighting. Conversely, when both police and firefighters respond to a natural disaster, such as an earthquake that has severed natural gas lines, EMS response may concentrate on treatment related to gas inhalation and burns instead of injuries arising from coincidental building collapse. The parties have not yet addressed such possibilities. Accordingly, we will not decide whether the district court should tally the time spent at accident scenes or natural disasters in the firefighter or police column.[19] Resolution of this issue is best left for

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[17] This regulation cross-references section 553.213(b), which applies to personnel cross-trained as police officers and firefighters ("public safety officers"). The proper exemption category for ambulance and rescue personnel, like that for public safety officers, depends on the type of activity in which these employees spend most of their time.

[18] We note that the percentage of calls handled by EMS personnel with fire and police personnel is similar, i.e. 27.92% with firefighters and 22.03% with police officers. We will not speculate as to whether more time is required to assist at a multiple shooting than at a house fire where EMS personnel stand by in event of injuries.

[19] An obvious alternative explanation is that EMS employees represent an entirely separate professional category, and the statutory scheme inherently forces an awkward fit between discrete job classifications and functions. It is surprising that specific legislation has not been introduced to deal with EMS personnel as an autonomous group.

the trial court to which the parties may present additional variables for consideration.

We vacate the district court's order of summary judgment. The court could not find as a matter of law that plaintiffs fell into either the firefighter or police officer exemption for overtime pay after forty hours of work because the inquiry did not first address the material fact of the number of *hours* spent in each type of exempt activity.

B. The "Good Faith" Defense

The district court granted defendant's motion for summary judgment, rendering moot the good faith issue raised by defendant.[20] *Wouters*, 793 F.Supp. at 314. Because we vacate the order granting summary judgment, the good faith issue remains open on remand.

C. The "Substantially Related" Standard

Because our opinion in *O'Neal* followed the district court's order, we take this opportunity to address several other issues that will be considered on remand.

In the instant case, the district court granted defendant's motion for summary judgment based on application of the "substantially related" standard. Use of this standard is

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[20] The good faith defense arises in 29 U.S.C. § 259 which provides that an employer is not subject to liability for the failure to pay overtime under the FLSA if:

> [H]e pleads and proves that the act or omission complained of was in good faith conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [a specified] agency of the United States . . ., or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. *Such a defense, if established, shall be a bar to the action or proceeding. . . .* (emphasis added).

predicated on a determination that plaintiffs are employed by a "public agency *other than* a fire protection or law enforcement agency." 29 C.F.R. § 553.215(a) (1993) (emphasis added). The trial court apparently deemed the pre-suit agency structure, in which plaintiffs and firefighters were in separate divisions, determinative in deciding whether to apply section 553.215(a). On remand, the court should specifically address two underlying issues: first, if the threshold inquiry discussed above focuses the remaining dispute on firefighter instead of law enforcement activities, what is the impact of the divisions' consolidation on applicability of this section; and second, if plaintiffs' work is to be evaluated for exemption based on law enforcement activities, does section 553.215 control the outcome?

If section 553.215(a) controls the analysis, the standard has two components: first, whether EMS personnel are "trained in rescue," and second, whether they are "regularly dispatched" to certain scenes. We agree with the district court that plaintiffs are "trained in rescue," *Wouters*, 703 F.Supp. at 314, thereby satisfying the first prong of the test whether evaluation is for the law enforcement or firefighter exemption. In light of our recent decision in *O'Neal*, we cannot agree with the district court's approach on the "regularly dispatched" prong of the substantially related inquiry.

In *O'Neal* we described the following factors to be considered when deciding if the employer regularly dispatches EMS personnel to either firefighter or law enforcement scenes:

> (1) the percentage of the [EMS] Service's total calls that are dispatches to fires, crimes, and automobile accidents; (2) the percentage of total EMT man-hours spent responding to dispatches to fires, crimes, and automobile accidents; and (3) the percentage of the total number of all fires, automobile accident, and

> police calls that occur throughout the county to which the Service is dispatched.

O'Neal, 980 F.2d at 679. In keeping with the precise language of section 553.215(a)(2), we added that EMS response to riots and natural disasters should also be considered where supported by the facts. *Id.* at n. 18.

On remand, after deciding if the employer correctly places plaintiffs in an exempt status under section 553.215(a), the "regularly dispatched" inquiry must first focus on the percentage of total *EMS* calls, not firefighter or police officer calls, which are dispatches in the applicable categories. We do not decide what percentage of calls satisfies the regularly dispatched requirement, *see O'Neal*, 980 F.2d at 680, but emphasize that this is only one factor in the analysis. Regarding the second prong, we find no reference in the record to the total number of EMS hours spent on regular joint responses with either police or fire-fighters.[21] Nor do the figures presented address the third inquiry. No doubt, assessing the total number of calls in the county for each category requires examination of police, fire, and EMS records in conjunction with one another. We note that the percentages considered by the district court apparently included "medical assists" by firefighter units to EMS units. On remand, the parties may consider exclusively EMS responses to fires, crime scenes, riots, natural disasters and accidents. 29 C.F.R. § 553.214(a)(2).

D. The "Integral Part" Standard

Our decisions in *O'Neal* and *Spires v. Ben Hill County*, 980 F.2d 683 (11th Cir. 1993), recognized that the integral part test presents an inquiry distinct from the substantially

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[21] Quite possibly, a major structure fire would occupy several EMS units for many hours, while an automobile accident may be handled in a matter of minutes.

related standard. *O'Neal,* 980 F.2d at 676; *Spires,* 980 F.2d at 685. The "integral part" language arises in 29 C.F.R. § 553.210(a), defining fire protection activities. After listing four criteria underpinning the fire protection employee label, the regulation provides that "the term would also include rescue and ambulance service personnel if such personnel form *an integral part* of the public agency's fire protection activities." 29 C.F.R. § 553.210(a) (emphasis added). Similar language appears in § 553.211(a) regarding law enforcement activities. Neither regulation provides guidance about what constitutes an integral part, nor have we interpreted the term or the precise relationship between the integral part and substantially related standards.

The district court did not engage in a separate integral part inquiry at all. Defendant suggests that the integral part test represents a standard that is distinct and applicable to the present facts. We leave it to the district court to analyze the relationship between the "substantially related" and "integral part" standards and their applicability to the present case.

E. The Twenty Percent Rule

In *O'Neal* we disagreed with the district court conclusion that the 80/20% rule was inapplicable to ambulance and rescue workers. *O'Neal,* 980 F.2d at 680. In so doing, we specifically approved of the decision by the district court in the instant case, which concluded that the rule is applicable to EMS workers. *Id.* at 680-81. Accordingly, if the County proves its entitlement to a section 7(k) exemption, that exemption must survive scrutiny under the 20% rule as well.

We have previously implicitly imposed upon the employer the burden of showing that its exemption is not defeated by the 20% rule. *Id.* at 682 ("By superimposing the 80/20 rule [on the substantially related test], only those

public agencies whose ambulance and rescue service employees spend a substantial amount (at least 80%) of their work hours in related activities are eligible for the section 7(k) exemption."). In keeping with the principle that exemptions from section 7(a) must be narrowly construed against the employer who also bears the burden of proof, *O'Neal,* 980 F.2d at 677, we now hold explicitly that to defeat an employee suit, the employer must demonstrate entitlement to an exemption under either the law enforcement or firefighter provisions, and also that the exempt employees work at least 80% of the time in related activities.

Categorizing activities as exempt or nonexempt is challenging. In the present case, defendants argue that all plaintiffs' time is spent in exempt activities. However, the record does not analyze the time plaintiffs spend awaiting calls and it appears that the court counted medical emergency dispatches as exempt activities. On remand, the district court is guided by our discussion in *O'Neal,* where we stated that station time spent awaiting calls is exempt except to the extent that the employer requires EMTs to perform tasks unrelated to fire protection or law enforcement, *id.* at 682, while "medical emergency hours" and time spent at accident scenes unrelated to automobiles are nonexempt. *Id.* at 681.

The consideration may also be informed by section 553.213(a), regarding public agency employees engaged in both fire protection and law enforcement activities:

> [A]ll time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be *combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.*

29 C.F.R. § 553.213(a) (1993) (emphasis added). We are aware that this section pertains specifically to "public

safety officers," not to ambulance and rescue service employees. However, section 553.215 which applies to EMS personnel cross-references the public safety officer regulation; albeit, the cross-reference is to subsection (b), not to subsection (a). We leave it to the parties to develop on remand the possible implications of the statutory scheme.

F. The Fourteen Dismissed Plaintiffs

Plaintiffs allege that the district court abused its discretion is dismissing fourteen plaintiffs from the suit as a sanction for violation of a discovery order.[22] This issue warrants further detailing of the procedural background.

On August 2, 1991, defendant served each plaintiff with interrogatories. Pursuant to an unopposed motion for extension of time, the court gave plaintiffs until October 2 to respond. On November 27, 1991, after some correspondence between counsel about the interrogatories, defendant moved for discovery sanctions. The court granted defendant's request, authorized attorney's fees for preparation of the motion, and directed plaintiffs to submit proper answers to interrogatories by January 31, 1992. The court warned that "[f]ailure to do so will result in dismissal of the cause of action as to those plaintiffs not responding *properly*." [Order of January 7, 1992, emphasis added.] The court offered no further elaboration of the term "properly." Thereafter, thirteen of the fourteen dis-

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[22] Defendant asserted, without citation to rule or precedent, that the issue was waived because the order of dismissal was "final" as to these plaintiffs, and appeal was not taken within thirty days. (Appellee's Brief at p. 10, n. 1.) We find this argument spurious. Under Fed.R.Civ.P. 54(b), when multiple parties are involved the court may direct entry of final judgment as to one or more but fewer than all of the claims or parties "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The district court did not make these express findings; the time for appeal did not begin to run; and defendant's unsupported contention is totally meritless.

missed plaintiffs responded to the interrogatories. On February 10, 1992, defendant moved to dismiss pursuant to Fed.R.Civ.P. 37(b)(2)(C) based on plaintiffs' failure to comply with the discovery order by giving *improper* answers to interrogatories. Meanwhile, defendant deposed plaintiffs and received full answers to their questions. On March 24, 1992, the district court dismissed the plaintiffs, referring to its January 7th order, and noting plaintiffs' failure to object to the interrogatories despite the passage of six months and several warnings to properly respond.

One further order requires our attention. On July 16, 1992, the trial court ruled on defendant's motions to tax costs and fees. In that order, the court 1) awarded defendant $3,137.50 attorney's fees for preparation of the original motion for sanctions; 2) awarded deposition costs of $4,527.10 incurred because of plaintiffs' failure to timely and properly answer interrogatories; but 3) denied attorney's fees of $2881.25[23] for preparation of defendant's motion to dismiss for violation of the first discovery order. The court specifically noted that award of attorney's fees for work on the motion to dismiss did "not seem to be a proper sanction." [Order of July 16, 1992.]

Federal Rule of Civil Procedure 37(b)(2) provides in relevant part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order . . . dismissing the action or proceeding or any part thereof. . . .

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[23] This figure was not included in the order. We extract it from Defendant's Reply Memorandum in Support of its Motion for Attorney's Fees and Costs Incurred in Obtaining Order Dismissing Fourteen Plaintiffs, R6-106-4.

. . .

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Sanctions allowed under Rule 37 are intended to 1) compensate the court and other parties for the added expense caused by discovery abuses, 2) compel discovery, 3) deter others from engaging in similar conduct, and 4) penalize the offending party or attorney. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976). The trial court's discretion regarding discovery sanctions is not unbridled. *Pesaplastic, C.A., v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1519 (11th Cir. 1986). We have consistently held that while district courts have broad powers under the rules to impose sanctions for a party's failure to abide by court orders, dismissal is justified only in extreme circumstances and as a last resort. *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir.) *cert. denied*, ___ U.S. ___ , 114 S.Ct. 181, 126 L.Ed.2d 140 (1993); *Ford v. Fogarty Van Lines, Inc.*, 780 F.2d 1582, 1583 (11th Cir. 1986); *State Exchange Bank v. Hartline*, 693 F.2d 1350, 1352 (11th Cir. 1982).

Dismissal is warranted only where noncompliance with discovery orders is due to willful or bad faith disregard for those orders. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986). While our review is sharply limited to search for an abuse of discretion and determination that the trial court's findings are supported

by the record, we will find abuse of discretion if less drastic sanctions would suffice. *Malautea,* 987 F.2d at 1542; *Navarro v. Cohan,* 856 F.2d 141, 142 (11th Cir. 1988); *Pesaplastic,* 799 F.2d at 1519.

We agree with plaintiffs that the district court abused its discretion by dismissing the fourteen plaintiffs who failed to respond properly to interrogatories. First, a lesser sanction was available. In its July 16, 1992 order, the trial court specifically noted that defendant requested the award of attorney's fees for preparation of the motion to dismiss pursuant to plaintiffs' violation of the discovery order. The court had already rejected this less drastic sanction and opted instead to dismiss. *Cf. Navarro,* 856 F.2d at 142 (affirming dismissal that took place only after other less drastic sanctions had failed). Second, the trial court made no specific finding of bad faith resistance to its discovery orders. *See Beavers v. American Cast Iron Pipe Co.,* 852 F.2d 527, 528 (11th Cir. 1988); *Cox,* 784 F.2d at 1556. Third, plaintiffs' noncompliance with the discovery order did not prejudice defendant. *See Fogarty Van Lines,* 780 F.2d at 1583. Defendant admitted in oral argument that it obtained proper or complete answers during plaintiffs' depositions. Defendant used these depositions in support of its successful motion for summary judgment. Furthermore, the court awarded deposition costs to defendant as part of the sanction.

While we believe the district court was justifiably frustrated by plaintiffs' apparent recalcitrance, we do not believe violation of the discovery orders arose to the sort of willfully contemptuous conduct warranting dismissal that we have affirmed in the past. *See Malautea, Navarro, Pesaplastic, supra.* This discussion in no way suggests our approval of plaintiffs' conduct. We have previously noted that:

> The reversal of the dismissal with prejudice does not deprive the district court of the authority to impose

> lesser sanctions against the plaintiff, or disciplinary action against the attorney, if the Court decides such would be appropriate under the established law and the facts of this case.

Fogarty Van Lines, 780 F.2d at 1583. We are confident that the district court will elect appropriate sanctions, and that further discovery will be uncomplicated by negligent or intentional dilatoriness by counsel for either party.

For all the foregoing reasons we REVERSE the dismissal of fourteen plaintiffs, VACATE the order of summary judgment, and REMAND.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-14047-CIV-GONZALEZ

RICHARD WOUTERS, et al.,

Plaintiffs,

v.

MARTIN COUNTY, FLORIDA,

Defendant.

FILED
MAY 15 1992

FINAL JUDGMENT FOR DEFENDANT

THIS CAUSE has come before the Court upon the Court's Order dated May 14, 1992, and the Court being otherwise duly advised, it is hereby:

ORDERED and ADJUDGED that Final Judgment and the same be ENTERED on behalf of the defendant, Martin County, Florida, and against the plaintiffs, Richard Wouters, et al., and this case will stand dismissed with prejudice. Costs will be taxed on behalf of defendant and against the plaintiff upon appropriate application.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 14th day of May, 1992.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: All counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-14047-CIV-GONZALEZ

RICHARD WOUTERS, et al.,

Plaintiffs,

v.

MARTIN COUNTY, FLORIDA,

Defendant.

FILED
MAY 15 1992

ORDER

THIS CAUSE has come before the Court upon the parties' cross motions for summary judgment. The defendant's motion is for summary final judgment; plaintiffs' motion is for judgment as to liability only.

The instant issue is whether Martin County is violating provisions of the Fair Labor Standards Act (FLSA); specifically, whether the County is entitled to the overtime exemption found in 29 U.S.C. § 207(k).

The court notes that two Georgia cases involving similar issues (but decided differently) are currently pending before the Eleventh Circuit. *O'Neal v. Barrow County Board of Commissioners*, 743 F.Supp. 859 (N.D.Ga. 1990); *Spires v. Ben Hill County*, 745 F.Supp. 690 (M.D.Ga. 1990). Several other courts, discussed below, also have addressed similar or substantially similar issues. *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991); *Horan v. King County*, 740 F.Supp. 1471 (W.D.Wash. 1990).

FACTS

Plaintiffs are Emergency Medical Technicians (EMTs) and paramedics who comprise the Emergency Medical Service (EMS) in Martin County. These personnel work with the fire department as components of the emergency response system in the County. Firefighters and EMS staff are assigned to facilities throughout the County in order to respond effectively and quickly in emergency situations. These facilities are staffed 24 hours per day, 365 days per year. Plaintiffs receive overtime pay after 53 hours of work weekly (instead of forty hours) because the County applies the 7(k) exemption of the FLSA to ambulance service personnel who are trained in rescue techniques and who are regularly dispatched with firefighters. 29 CFR § 553.215.

The facts reveal that EMTs in Martin County are trained in extrication techniques and have received instruction in basic life saving and life support procedures. (*See* Plaintiffs' Responses to Defendant's Request for Admissions.) The instant plaintiffs are regularly dispatched to fires, auto accident scenes, hazardous waste spills, and other accidents involving personal injury in order to provide emergency medical service to said victims. EMS personnel are often dispatched jointly with firefighters and they work as a team in numerous situations.

The narrow legal issue is whether Martin County is entitled to the 7(k) exemption as defined in § 553.215. If the Court finds for plaintiffs, a second issue must be addressed; whether defendant is entitled to a statutory "good faith" exception pursuant to 29 U.S.C. § 259.

DISCUSSION

Summary judgment may be granted when there are ". . . no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Tippens v. Celotex Corp.*, 805 F.2d 949,

952-954 (11th Cir. 1986); *See also*, C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2725 at 75 (1983). The evidence must be viewed in the light most favorable to the non-moving party. *Tippens*, 805 F.2d at 892, *Sweat v. Miller*, 708 F.2d 655, 656-657 (11th Cir. 1983).

"In order to avoid the grant of summary judgment, a party must demonstrate both the existence of a material fact and a genuine issue as to that material fact. A fact is material if it constitutes a legal defense to an action." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980). In other words, a fact is material if it is an essential element of the cause of action. *Murphy v. Light*, 257 F.2d 323, 325 (5th Cir. 1958). In the instant matter, this burden has not been satisfied. The disputed facts cited by plaintiff are made moot and immaterial by the conclusions of law made below.

THE REGULATIONS

Ambulance and rescue service employees are specifically exempted (as fire protection or law enforcement personnel) by 29 CFR § 553.215 if

> their services are *substantially related* to fire fighting. . . . in that (1) ambulance and rescue employees have *received training* in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are *regularly dispatched* to fires, crime scenes, riots, natural disasters, and accidents.

Id. (emphasis added).

Thus, the "substantially related" test is met if an EMT has "received rescue training" and is "regularly dispatched."

The 20% Rule

The confusion with this issue begins with whether the 20% rule (a/k/a/ "80/20 rule") found in 29 CFR § 553.212 applies to ambulance service personnel defined in § 553.215. § 553.212 specifically refers to §§ 553.210/.211, the provisions involving firefighters and police officers, but does not refer specifically to § 553.215, the provision covering EMTs. Further confusion arises because §§ 553.210/.211 specifically reference § 553.215 when defining the term "any employee" in those sections. As a primary issue, the court finds that the 80/20 rule found in 29 CFR § 553.212 *does apply* to EMTs as defined in § 553.215.

The effect of the 20% rule is that the County's exemption is lost if those employees work more than 20% of the time on non-exempt activities. Thus, if a firefighter is sent to work on a road crew more than 20% of the time, the County loses the exemption. The 80/20 rule specifically applies to "firefighters" as defined in § 553.210, and said definition includes "rescue and ambulance service personnel" as defined in § 553.215.[1] Furthermore, nothing in the statutory scheme indicates that EMT's should be treated with less deference than the firefighting personnel whose rubric EMTs fall under.[2]

In practical terms, a holding that the 20% rule does not apply to § 553.215 would mean that the County is free to dispatch its EMTs and paramedics to do any job (road repair, sanitation disposal, parks and recreation) without fear of losing the 7(k) overtime exemption. Clearly, such

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[1] § 553.210 states, in pertinent part, that "[t]he term [any employee] would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215."

[2] Indeed, it would be anomalous to offer firefighters "more protection" than the ambulance service personnel whose status under the exemption is determined by the fact that they work in conjunction with the firefighting personnel.

a ludicrous result is not contemplated by the regulations at issue.

Having found that § 553.212 is applied to the EMTs as defined in § 553.215, the issue then becomes defining "non-exempt" work. The court agrees with defendant that the *Spires* and *Horan* courts "misperceived" the concept of "nonexempt" activity.[3]

The plaintiffs argue that non-exempt activity includes *anything* that is not related to firefighting, accident scenes, etc. For example, in plaintiffs' view, if EMTs responded 50% of the time with the fire department and 50% of the time to heart attack victims, the responses to heart attacks would be non-exempt activity. The consequence of this interpretation is that 80% of EMS responses must be with the Fire Department or the County loses its 7(k) exemption.

The defendants urge, as stated above, that exempt activity includes all duties incident to ambulance and rescue service. Thus, nonexempt work for EMTs would be working on the "road crew" or assisting the Parks Department, to name two examples. The interpretation urged by defendant is only reasonable given the fact that § 553.215 explicitly takes into account the nature of work performed by ambulance service personnel. There is no indication that the "other" ambulance duties should be construed as nonexempt activity.

Accordingly, the court finds that ambulance service activity which is unrelated to fire rescue does not count as nonexempt activity.

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[3] The *Horan* and *Spires* courts seem to indicate that "nonexempt" activity includes anything that is not directly fire related. *Horan at 1479; Spires* at 700. This interpretation, while reasonable, contradicts the plain meaning of § 553.215 which already factors in that ambulance service personnel perform both fire and non-fire related duties. As stated in the text, such an interpretation transforms the "regularly dispatched" test into an "dispatched 80% of the time" test.

Although this court's decision that the 20% rule applies to EMTs differs from the decisions in *O'Neal* and *Bond*, the logic of those decisions is applicable here in deciding what is nonexempt activity. The underpinning of those decisions is that the 80/20 rule cannot be applied to rewrite the plain meaning of § 553.215. In other words, to apply the 20% rule as plaintiffs suggest would be to change the "regularly dispatched" rule to a "dispatched 80% of the time" rule. Such an interpretation would be "redundant and contradictory." *O'Neal*, at 862.

The Department of Labor (DOL) has issued Letter Rulings which further illustrate the point. One DOL Letter Ruling (October 9, 1987), states that "no specific frequency of occurrence. . . establishes 'regularity'; it must be determined on the basis of the facts in each case." *See* Defendant's Exhibit 6. This ruling, and other similar rulings cited by defendant, clearly demonstrate that at no time was "regularly dispatched" intended to mean 80% of the time. If such a meaning was intended, the regulation easily could have been drafted to read that ambulance service personnel, in order to be exempted, must respond with the fire department 80% of the time. That, however, is not how the regulation was drafted. To read in such a requirement through § 553.212 would be to fundamentally change the plain meaning of the regulation.

§ 553.215 TEST

Having found that the 20% rule does not alter the requirements of § 553.215, the court must now determine if plaintiffs meet the two part test.

As stated above, ambulance and rescue service employees are specifically exempted (as fire protection or law enforcement personnel) by 29 CFR § 553.215 if "their services are *substantially related* to fire fighting. . . . in that (1) ambulance and rescue employees have *received training* in the rescue of fire, crime, and accident victims or fi-

refighters or law enforcement personnel injured in the performance of their respective duties, and (2) ..... are *regularly dispatched* to fires, crime scenes, riots, natural disasters, and accidents." *Id.* (emphasis added). Thus, the "substantially related" test is met if an EMT has "received training" and is "regularly dispatched."

The instant plaintiffs have received the necessary training as contemplated by the regulations. The DOL has defined "rescue" as "actions taken to free a victim from imminent danger or harm by the most expeditious means." "Trained to rescue" has been interpreted to mean "that the individual has knowledge of basic life-saving procedures and life support procedures (CPR, administering oxygen, and extrication techniques). However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred to above." *See* Letter Ruling of October 9, 1987.

The undisputed facts (admitted by plaintiffs) are that the instant plaintiffs have been trained in the above defined procedures. Indeed, plaintiffs concede in their admissions that they have 1) received training and instruction in the rescue and extrication of automobile accident victims; 2) received training in the medical rescue of auto accident victims; 3) received training in the treatment of burns; 4) received training in the treatment of heat exhaustion; 5) received training in the treatment of smoke inhalation, and 6) received training to provide necessary emergency treatment at fire, accident, riot, natural disaster, and crime scenes.

The DOL letter further stated that the EMT's need not be trained or required to perform fire evacuation or suppression in order to be "substantially related" to firefighting. Accordingly, plaintiffs' argument that they "have not had the training to be firefighters" is absolutely irrelevant in the disposition of this issue.

The Court finds, based on the pleadings submitted by plaintiffs and defendant, that the Martin County EMTs and paramedics meet the "trained to rescue" prong found in § 553.215.

The second element which must be met to receive the 7(K) exemption is the "regularly dispatched" factor. The plaintiffs admissions concede that they are regularly dispatched to fires, automobile accidents, other personal injury accidents, etc. The plaintiffs similarly admitted that they would be dispatched to a natural disaster if one occurred.

Notwithstanding its admissions to the contrary, plaintiffs claim that they do not meet the "regularly dispatched" test. Plaintiffs support this assertion by citing statistics which indicate, depending on the one chosen, that the plaintiffs respond to either 12%, 31% or 51% of "fire calls." Without any citation or support, plaintiffs claim that said percentages do not meet the regularly dispatched test. The court disagrees.

As stated by the court in *O'Neal*, " 'Regularly' does not indicate any specific frequency of occurrence, but rather indicates a pattern of recurrence." *O'Neal* at 863. Indeed, such a holding is consistent with the DOL Letter Ruling cited above which states that "[t]here is no frequency of occurrence which establishes 'regularity'; it must be determined on the basis of the facts in each case." EMS personnel in Martin County responded to an average of 285 structure fires per year from 1989-1991.[4] Plaintiffs also admitted being sent to other fires such as brush fires. In addition, plaintiffs responded regularly with the fire department to accident scenes, etc. where fires or injuries might have been involved. The above factors and the uncontroverted fact that plaintiffs responded to over five fires per week establishes that the "regularly dispatched"

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[4] In *O'Neal*, 4 to 12 times per year was found to be "regular."

prong of the § 553.215 test is met in this case. The Court expressly rejects the proposition that the 80/20 rule requires dispatch with firefighters 80% of the time to establish "regularity."

The parties have also briefed the issue of defendant's "good faith" defense as found in 29 U.S.C. § 259. Because of the holding made above, that issue is moot and will not be discussed by the Court.

The Court has reviewed the motions and the record, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED that the plaintiffs' motion for partial summary judgment be DENIED. The defendant's motion for summary judgment is GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 14th day of May, 1992.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

cc: All counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4557

RICHARD WOUTERS, TIMOTHY H. WALKER, KARIN T. KLAUSE, DAVID VITY, JANET S. ZOLDAK, FRANK R. PINO, RANAE D. CEREZO, WADE H. MALLARD, MARK R. BENTS, DAVID L. ZARKER, STEPHEN G. SMITH, TERRY N. WILKES, JR., ERROL L. WRIGHT, JR., REBECCA L. PICKERING, DANIEL WOUTERS, KAREN S. JORDAN, RICHARD M. WILDE, GEORGENE BAILES, CARLTON L. JONES, MARK D. HELLSTROM, WILLIAM MAHNEKE, JAMES D. KAY, JOSEPH V. FERRARA, WILLIAM M. GODFREY, MOETAHAR PADELLAN, MARC DUCOTE, SHANNON K. WALKER, MARK L. WHITLOCK, and ANNE DAVIS,

Plaintiffs-Appellants,
Cross-Appellees,

versus

MARTIN COUNTY, FLORIDA,

Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 24 1994

MIGUEL J. CORTEZ
CLERK

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: CARNES, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4557

District Court No. 91-14047-Civ

RICHARD WOUTERS, TIMOTHY H. WALKER, KARIN T. KLAUSE, DAVID VITY, JANET S. ZOLDAK, FRANK R. PINO, RANAE D. CEREZO, WADE H. MALLARD, MARK R. BENTS, DAVID L. ZARKER, STEPHEN G. SMITH, TERRY N. WILKES, JR., ERROL L. WRIGHT, JR., REBECCA L. PICKERING, DANIEL WOUTERS, KAREN S. JORDAN, RICHARD M. WILDE, GEORGENE BAILES, CARLTON L. JONES, MARK D. HELLSTROM, WILLIAM MAHNEKE, JAMES D. KAY, JOSEPH V. FERRARA, WILLIAM M. GODFREY, MOETAHAR PADELLAN, MARC DUCOTE, SHANNON K. WALKER, MARK L. WHITLOCK, and ANNE DAVIS,

Plaintiffs-Appellants,
Cross-Appellees,

versus

MARTIN COUNTY, FLORIDA,

Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

DEC 21 1993

MIGUEL J. CORTEZ
CLERK

Before FAY and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of dismissal as to fourteen plaintiffs of the said District Court is hereby REVERSED; the order granting summary judgment is hereby VACATED; and that these causes be and the same are hereby REMANDED to said District Court for further consideration in accordance with the opinion of this Court;

It is further ordered that defendant-appellee, cross-appellant pay to plaintiff-appellants, cross-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 21, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MARCH 8, 1994

STATUTE AND REGULATIONS

29 U.S.C. § 207(k):

(k) *Employment by public agency engaged in fire protection or law enforcement activities*

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Exemption Requirements

29 C.F.R. Sec. 553.210 Fire protection activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who

has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as maintenance and office personnel who do not fight fires on a regular basis. It may include such employees during emergency situations

when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraphs (b)(1), (2) and (3) of this section. Additionally, for those persons who actually engage in those fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

29 C.F.R. Sec. 553.211 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or wilful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

(b) Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties

incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.215.

(c) Typically, employees engaged in law enforcement activities include city police; district or local police, sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(d) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdiction. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C), and see § 553.11. Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five

employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(e) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities" as that term is used in sections 7(k) and 13(b)(20). Employees who normally would not meet each of these tests include

(1) Building inspectors (other than those defined in § 553.213(a)),

(2) Health inspectors,

(3) Animal control personnel,

(4) Sanitarians,

(5) Civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points,

(6) Civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices,

(7) Wage and hour compliance officers,

(8) Equal employment opportunity compliance officers,

(9) Tax compliance officers,

(10) Coal mining inspectors, and

(11) Building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(f) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or com-

mitted some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (*e.g.*, warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent," and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (g) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(g) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in performance of their duties.

29 C.F.R. Sec. 553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211,

may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

(b) Public agency fire protection and law enforcement personnel may, at their own option, undertake employment for the same employer on an occasional or sporadic and part-time basis in a different capacity from their regular employment. (See § 553.30.) The performance of such work does not affect the application of the section 13(b)(20) or 7(k) exemptions with respect to the regular employment. In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work discussed in paragraph (a) of this section.

29 C.F.R. Sec. 553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called "public safety officers") who engage in both fire protection and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat either the section 13(b)(20) or 7(k) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.210 and 553.211. This is so regardless of how the employee's time is divided between the two

activities. However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.

(b) As specified in § 553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

29 C.F.R. Sec. 553.214 Trainees.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing agency, constitutes engagement in activities under section 7(k) only when the employee meets all the applicable tests described in § 553.210 or § 553.211 (except for the power of arrest for law enforcement personnel), as the case may be. If the applicable tests are met, then basic training or advanced training is considered incidental to, and part of, the employee's fire protection or law enforcement activities.

29 C.F.R. Sec. 553.215 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime,

and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered and nonexempt employees. This would include, for example, employees of public agencies engaged in the operation of a hospital or an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency or their employer is under contract with a public agency to provide such services.

* * * *

Administrative Letter Rulings: Department of Labor, Wage and Hour Division

Letter Ruling: October 9, 1987 (no number assigned)

This is in further response to your letter, with enclosures, addressed to Assistant Area Director _____ concerning the application of the Fair Labor Standards Act (FLSA) to emergency medical service employees, also referred to as EMTs (emergency medical technicians), of the City of _____ (the City). We regret the delay in responding to your inquiry.

The FLSA is the Federal law of this most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. This applies to all employees of State and local governments except to those who are specifically excluded in section 3(e)(2)(C) of FLSA or who may qualify for exemption from the minimum wage and/or overtime pay provisions of the Federal law.

On January 16, the Department of Labor (the Department) published final regulations which implement the Fair Labor Standards Amendments of 1985. These regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

You wish to know if the EMTs are primarily engaged in law enforcement or fire protection activities for the purpose of applying the provisions of section 7(k) of FLSA. Section 7(k) provides a partial overtime pay exemption for public agency employees employed in fire protection or law

enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in fire protection or law enforcement activities.

The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period.

In an opinion (copy enclosed) issued by this office in 1985, we set forth two tests for determining if the activities of EMTs are "substantially related" to fire protection or law enforcement as described in section 553.215 of Regulations, 29 CFR Part 553. The first test requires that EMTs be trained to *rescue* individuals who have been injured or who are in danger of being injured. Under these circumstances, the term "rescue" refers to actions taken to free a victim from imminent danger or harm by the most expeditious means. In many cases, this may require an EMT to take action beyond merely applying emergency medical treatment such as bandaging, administering oxygen, or transporting an individual to a hospital. For instance, there may be situations where the EMTs, as the first responders at the scene of an automobile accident, must extricate an injured person from a vehicle in order to begin treatment and preparation for movement as soon as possible. As stated in the material enclosed with your inquiry, the "EMT will have to use whatever means are available to gain access to the patient and disentangle him from the wreckage. . . ." This means that an EMT must be properly trained to operate special types of equipment, such as hydraulic "spreaders" or chemical foam extinguishers, in case they are available for their use at the accident scene. Therefore, we interpret the requirement

that an EMT be "trained to rescue" as meaning that the individual has knowledge of basic life-saving procedures and life-support procedures (i.e. CPR, administering oxygen, and extrication techniques). However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred to above.

You have indicated that the EMTs who are the subject of your inquiry are not trained to rescue fire victims by removing them from burning buildings or other structures. This would require (1) extensive training in fire-suppression and evacuation techniques and (2) special equipment and protective clothing which could not be carried or transported by EMT crews. Under these circumstances, the obligation of an EMT to "rescue" a victim is limited by the nature of the event (fire) and the ability of the EMT to safely and efficiently provide assistance. Therefore, it is our opinion that an EMT need not be trained in fire-suppression or evacuation procedures in order to be engaged in activities which are "substantially related" to firefighting or law enforcement.

The second test to determine if activities are "substantially related" to fire protection or law enforcement is that EMTs must be "regularly dispatched" to such things as fires or accidents. (See section 553.215 of Part 553.) There is no specific frequency of occurrence which establishes "regularity"; it must be determined on the basis of the facts in each case.

You also indicate that the City is conducting a survey of the emergency medical service response logs to see if the majority of call-outs during a certain period were in conjunction with either the fire department or the police department. As stated in the opinion letter of October 11, 1985, if more than 50 percent of the fire protection/law enforcement call-outs during the applicable work period are calls related to fires, the EMTs who are properly trained

and regularly dispatched would qualify as "fire protection" employees for the purposes of section 7(k) of FLSA. The same applies to police call-outs as a means of determining if an EMT may qualify as a "law enforcement" employee.

Finally, you wish to know if a written opinion from the Wage and Hour Division in this matter would provide the City with a "good faith defense." Sections 9 and 10 of the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 259, and section 790.13 through 790.19 of Interpretative Bulletin, 29 CFR 790 set forth the conditions which support good faith reliance on an administrative regulation, order, ruling, approval, or interpretation.

Section 10(a) of the Portal Act provides that:

> . . . no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the act or proceeding . . . .

Subsection (b)(1) of this section states that, in the case of FLSA, the Agency referred to in subsection (a) shall be the Administrator of the Wage and Hour Division. However, it is our opinion that written rulings and opinions prepared for the signature of Wage and Hour staff below the level of the Administrator, when this position is not vacant, may not be relied on for purposes of good faith reliance under the Portal Act. This is so since neither the

Portal Act, Reorganization Plan No. 6 of 1950 (15 F.R. 3174), nor declarations of authority issued pursuant to the latter make reference to Department staff below that level.

We trust that the above is responsive to your inquiry.

Sincerely
/s/ Paula V. Smith
Administrator

* * * *

Supreme Court, U.S.
FILED
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(2)

No. 93-1867

In the
Supreme Court of the United States
October Term, 1994

MARTIN COUNTY, FLORIDA
Petitioner,
vs.
RICHARD WOUTERS, *et al.*,.
Respondents.

ON PETITION ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Eleventh Circuit's construction of the administrative rules adopted by the United States Department of Labor, implementing a limited exception for "fire protection" and "law enforcement" activities to the overtime provisions of the Fair Labor Standards Act (FLSA), is a correct interpretation which rationally ascribes functionality to each of the provisions of 29 C.F.R. §§553.210 *et seq.* and furthers the legislative purpose of 29 U.S.C. §207(k) by exempting only actual fire protection and law enforcement activities.

PARTIES TO THE PROCEEDINGS

The petitioner is this case is Martin County, Florida, a political subdivision of Florida.

The respondents are Richard Wouters, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, William M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis.

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No. 93-1867

In The

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October Term, 1993

MARTIN COUNTY, FLORIDA,

Petitioner,

vs.

RICHARD WOUTERS, *et al.*,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents, Richard Wouters, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, William M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis, urge the Court to deny the petition for writ of certiorari to review the judgment and

opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on December 21, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 9 F.3d 924 (11th Cir. 1993), and is reproduced in the petitioner's appendix at 1a through 21a.

The order of the District Court for the Southern District of Florida (Gonzalez, Jose A. Jr.) is reported at 793 F. Supp 310 (S.D. Fla. 1992), and is reproduced in the petitioner's appendix at 23a through 31a.

JURISDICTION

The Court's jurisdiction has been invoked by petitioners under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

29 U.S.C. §207(k)

[Reprinted in petitioner's appendix at 36a]

29 C.F.R. §§553.210 - 553.215

[Reprinted in petitioner's appendix at 36a through 44a]

STATEMENT OF THE CASE

A. Facts Material To Consideration Of The Question Presented

At all relevant times, Respondents were employed by the petitioner, Martin County, in its Department of Public Safety as Emergency Medical Services (EMS) personnel, and served as either Emergency Medical Technicians (EMTs) or as Paramedics (PMs).[1] (App. 2a-3a). This case involves the question whether it has been appropriate under the FLSA for the petitioner to pay overtime compensation to its EMS personnel as "firefighters", taking advantage of the limited exception provided by 29 U.S.C. §207(k). The dispute arises because — with the exemption — an employer must pay an overtime premium to "fire protection" employees after 53 hours in a work week, and to "law enforcement" employees after 43 hours. Otherwise, an employer must pay the overtime premium after 40 hours.

The facts found by the Court of Appeals and by the district court are substantially undisputed. Firefighters and EMS personnel comprise the county's emergency response system. Since this litigation began, the county has reorganized the system, by including firefighters and EMS personnel in the same division of the county public safety department. (App. 3a, 13a). Although the emergency response system does not include law enforcement personnel, EMS personnel respond to some emergencies

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[1] Petitioner's Statement of the Case is substantially correct. Our departures are noted below. For ease of understanding, we have attempted to mirror the terminology and organizational structure used by petitioner.

with firefighters, to other emergencies with law enforcement officers, and to other emergencies alone.[2] The petitioners' statistics show that during the studied period — from 1989 through 1991 — firefighters responded to 4,648 calls. Fifty-seven percent of the responses were with EMS personnel. During the same time period, however, the county's records show EMS personnel responded to 26,647 calls, including 5,872 calls with law enforcement officers. The Court of Appeals surmised the EMS personnel responded to approximately 50 percent of their calls without participation by either firefighters or law enforcement officers. The evidence does not show the relative amount of time EMS personnel spent in responding to calls with firefighter, with police officers, and alone. The evidence does not show which of the joint responses with firefighters or police officers included a response by all three elements. (App. 4a-7a). In addition, the county's statistics are relatively imprecise, because they are drawn from several different sources and contain categorical break downs which do not precisely overlap.

EMS personnel are intended to provide emergency treatment in a variety of circumstances, including fires, accidents, crimes, hazardous materials incidents, natural disasters and medical crises. They do not handle routine,

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[2] Generally, EMS personnel respond with firefighters on calls involving structure fires, vehicle accidents, and for medical assists. (App. 4a). They generally respond alone for other medical assists involving abdominal pains, allergic reactions, amputations, aneurysm, asthma, back pain, cardiac, choking, stroke, diabetic, electric shock and similar medical problems. Responses with police officers take place for automobile accidents, stabbings, rapes, poisonings, suicide attempts, drownings, gunshot wounds, assaults, dead persons, mentally ill persons and overdoses. (App. 6a-7a).

non-emergency, matters. All of their working hours are dedicated to EMS functions, such as emergency responses, vehicle and equipment maintenance, training, facility housekeeping, or awaiting an emergency call. (App. 3a-4a).

Firefighters and EMS personnel possess different skills. EMS personnel are not trained as firefighters. Most firefighters, however, are certified EMTs as well. Paramedics, in addition to EMT training, are trained in advanced life support techniques (ALS), which neither firefighters nor EMTs may perform. Paramedics and EMTs respond in teams to provide emergency medical support. (App. 4a).

Firefighters and EMS personnel work similar shifts, 24 hours on duty followed by 48 hours off. EMS personnel generally respond to calls in assigned ambulances, while firefighters respond in their assigned fire trucks.[3] Prior to this litigation, firefighters and EMS personnel were assigned to different divisions; they have subsequently been placed in a single Emergency Services Division of the county public safety department. Firefighters and EMS personnel belong to different unions and have different retirement plans. The record does not indicate whether law enforcement personnel share unions or retirement plans with EMS personnel. Firefighters and EMS personnel, even when jointly dispatched, operate on different radio frequencies. The record does not indicate whether the frequencies emanate from a share dispatch center, or whether law enforcement officers operate on the same frequencies or share the same

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[3] In one instance, a paramedic assigned to a fire station responds to calls aboard the fire truck.

dispatch center with either firefighters or EMS personnel. (App. 3a-7a).

B. Course Of Proceedings In The District Court

The respondents brought this action seeking to recover the overtime premium required by the FLSA for work beyond 40 hours in a work week. The petitioner defended by arguing that EMS personnel are firefighters and law enforcement personnel within the meaning of 29 U.S.C. §207(k), entitling the county to defer paying an overtime premium until an employee had worked 53 hours in a work week. The county also argued it was entitled to avoid liability because of its "good faith."

On cross-motions for summary judgment, the district court entered judgment for the county, finding that EMS personnel employed by the county provide services, within the meaning of 29 C.F.R. §215, which are "substantially related" to fire fighting, because respondents have "received training" in the rescue of fire, crime and accident victims or firefighters or law enforcement officers injured in the performance of their duties, and respondents are "regularly dispatched" to fires, crime scenes, riots, natural disasters, and accidents. (App. 25a).

The district court also found the so-called "20% Rule", set forth in 29 C.F.R. §553.212 to be fully applicable to ambulance and rescue service personnel for whom an exemption under 207(k) is sought. (App. 26a). Section 553.212 provides that the exemption is not applicable to an employee otherwise covered by 207(k) if the employee spends more than 20 percent of his work hours performing non-exempt activities. The district court noted that the crucial inquiry is what constitutes "non-exempt" work.

Rejecting the respondents' contention that non-exempt work is any work unrelated to fire protection or law enforcement activities, the court held that non-exempt work is work unrelated to ambulance and rescue service.

> The plaintiffs argue that non-exempt activity includes *anything* that is not related to firefighting, accident scenes, etc. For example, in the plaintiffs' view, if EMTs responded 50% of the time with the fire department and 50% of the time to heart attack victims, the responses to heart attacks would be non-exempt activity. The consequence of this interpretation is that 80% of EMS responses must be with the Fire Department or the County loses its 7(k) exemption.
>
> The defendants urge, as stated above, that exempt activity includes all duties incident to ambulance and rescue service. Thus, nonexempt work for EMTs would be working on the "road crew" or assisting the Parks Department, to name two examples. The interpretation urged by the defendant is only reasonable given the fact that § 553.215 explicitly takes into account the nature of work performed by ambulance service personnel. There is no indication that the "other" ambulance duties should be construed as nonexempt activity.
>
> Accordingly, the court finds that ambulance service activity which is unrelated to fire rescue does not count as nonexempt activity.

(App. 27a, emphasis in original).

Because the district court decided petitioner was entitled to summary judgment on the merits of its claim of exemption under 29 U.S.C. §207(k), it declined to decide

whether petitioner was entitled to a defense premised upon "good faith," holding the issue moot. (App. 31a).

C. Course of Proceedings Before The Eleventh Circuit Court of Appeals

The Circuit Court held that respondents are entitled to overtime compensation after 40 hours of work, unless the employer can establish entitlement to an exemption. The panel held that 7(k) of the Code of Federal Regulations provides a partial exemption, as fire protection and law enforcement activity, for ambulance and rescue service personnel who are employed by a public agency other than a law enforcement or fire protection agency, and their services are substantially related to fire protection or law enforcement. The Circuit Court noted that such services are substantially related if the EMS personnel have received training in rescue, and are regularly dispatched with firefighters or police officers. The court agreed with the district court that respondents have received appropriate training. (App. 9a).

The panel also held under 29 C.F.R. §212(a) that the 7(k) partial exemption is lost if the ambulance or rescue employees spend more than 20 percent of their work time performing non-exempt activities.

> Nonexempt work is that "which is not performed as an incident to or in conjunction with [the employees'] fire protection or law enforcement activities." This Court has held that work generally benefiting the employer, which employees are required to do while not engaged in activities related to their fire protection or law enforcement duties, is nonexempt work. Finally we note that exemptions from section 7(a) must be

> narrowly construed against the employer who bears the burden of proving any exemption.

(App. 10a, bracketed material in original, citations omitted).

The Eleventh Circuit panel vacated the district court's summary judgment order, finding the lower court "could not find as a matter of law that plaintiffs fell into either the firefighter or police officer exemption for overtime pay after forty hours of work because the inquiry did not first address the material fact of the number of *hours* spent in each type of exempt activity." (App. 12a, emphasis in original). The panel held that the district court's focus on the number of responses made by EMS personnel with firefighters or police officers or separately did not address the regulation's concern for the amount of time EMS personnel spend performing fire protection or law enforcement activities.

> The regulation's plain language requires comparison of the number of *hours* spent in each type of activity instead of the percentage of calls falling into each classification.

(App. 11a, emphasis in original, footnote omitted).

After vacating the district court's summary judgment order, the appellate panel went on to instruct the district court on the issues on which certiorari is now sought.[4] Among other issues, the panel specifically instructed the district court that EMS hours which are unrelated to fire protection or Law enforcement activities are non-exempt under the 20 percent rule.

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[4] Because the panel's additional rulings were unnecessary to the disposition on appeal, they may well constitute dicta.

> We have previously implicitly imposed upon the employer the burden of showing that its exemption is not defeated by the 20% rule. *Id.* At 682 ("By superimposing the 80/20 rule [on the substantially related test], only those public agencies whose ambulance and rescue service employees spend a substantial amount (at least 80%) of their work hours in related activities are eligible for the section 7(k) exemption."). In keeping with the principle that exemptions from section 7(a) must be narrowly construed against the employer who also bears the burden of proof, *O'Neal*, 980 F.2d at 677, we now hold explicitly that to defeat an employee suit, the employer must demonstrate entitlement to an exemption under either the law enforcement or firefighter provisions, and also that the exempt employees work at least 80% of the time in related activities.

(App. 15a-16a).

The panel remanded to the district court for substantial additional factual and legal development.

WHY THE WRIT SHOULD BE DENIED

ARGUMENT

> Whether the Eleventh Circuit's construction of the administrative rules adopted by the United States Department of Labor, implementing a limited exception for "fire protection" and "law enforcement" activities to the overtime provisions of the Fair Labor Standards Act (FLSA), is a correct interpretation which rationally ascribes functionality to each of the provisions of 29 C.F.R. §§553.210 *et seq.* and furthers the legislative purpose of 29 U.S.C. §207(k) by exempting only actual fire protection and law enforcement activities.

The Eleventh Circuit's decision in this case studiously follows the language of the statute and its implementing regulations, and gives both a construction which effectuates the statutory purpose.

The reasons given by the petitioner for granting the writ do not militate in favor of review, and particularly not at this stage of development. Petitioner's argument that the Circuit Court has failed to give deference, or special deference, to the Department of Labor's regulatory scheme is barren. There is, simply, so support for this view. Nowhere within the appellate decision is there any language which rejects the regulations in favor of the panel's view of the meaning of the statute. Rather, the Court gives a construction to the rules which is in harmony with the statute. Even if the Eleventh Circuit construction were incorrect — and we believe it was not — the appellate court would not have failed to give deference to the regulatory scheme. The petitioner's real point is that it disagrees with

the construction adopted by the Circuit Court, and prefers the construction applied by the district court. Standing alone, this disagreement is not a reason for granting review by the Supreme Court.

The Eleventh Circuit's view is the better one, because it recognizes that the exemptions provided under 29 U.S.C. §207(k) were promulgated for fire protection and law enforcement functions. There is no statutory exemption for ambulance and rescue services employees. However, the Department of Labor's regulations recognize that in many circumstances ambulance and rescue services employees may be predominantly involved in providing fire protection or law enforcement services. In those instances, where the ambulance and rescue services activities are "substantially related to" or are an "integral part of" fire protection or law enforcement, the regulations treat the employees as firefighters or police officers for purposes of overtime pay. The regulations provide a rational means for identifying those employees who are providing the exempt services.

The regulatory scheme also provides a safeguard, in the form of 29 C.F.R. 553.212, to insure that employees otherwise subject to the exemption are performing fire protection or law enforcement activities to a sufficient degree to merit the statutory exemption. The Eleventh Circuit decision applies this 20 percent rule even handedly to all employees within the ambit of the exemption, whether they are firefighters, police officers or ambulance and rescue service employees. This is the only logical approach, because the focus is on whether the employees are sufficiently performing fire protection or law enforcement activities to fall within the exemption statutorily provided for fire protection and law enforcement activities.

The petitioner prefers the district court's construction, which would apply the 20 percent rule, but would count ambulance and rescue services duties which are unrelated to fire protection or law enforcement as exempt work. This approach is actually antithetical to the regulatory scheme, since the differentiation between exempt and non-exempt work does not further the inquiry into the degree to which the employees are engaged in fire protection or law enforcement. Oddly, the district court's example in rejecting the respondents' position illustrates well the anomaly that is created unless the 20 percent rule is used to differentiate between activities which are related or unrelated to fire protection and law enforcement. The district court projected that "in the plaintiffs' view, if EMTs responded 50% of the time with the fire department and 50% of the time to heart attack victims, the responses to heart attacks would be non-exempt activity", and the 20 percent rule would defeat the exemption. Yet if one applied the district court's rule, but reversed the example, the result is truly anomalous. If firefighters and EMS personnel responded jointly to 50 percent fires and to 50 percent heart attacks, the exemption would be lost for the firefighters, but not for the EMS personnel.

The Eleventh Circuit's approach appropriately and rationally construes both the statute and the implementing regulations.

The petitioner's second point, that this case presents an important issue which should be settled by this Court, is also ill-considered. This case presents only a straight-forward, uncomplicated question of statutory and regulatory construction, on which the federal judicial circuits are in harmony. This case, together with the decisions in *Bond v. City of Jacksonville,* 939 F.2d 285 (5th Cir. 1991); *Justice v.*

Metropolitan Govt. Of Nashville, 4 F.3d 1387 (6th Cir. 1993); *O'Neal v. Barrow County Bd of Comm'rs,* 980 F.2d 674 (11th Cir. 1993); and, *Spires v. Ben Hill County,* 980 F.2d 683 (11th Cir. 1993); are substantially all of the decisions which address the issue. While there are some differences in the application of the statute and rules, there is no conflict among the circuits regarding the issue in this case.. Ordinarily both the absence of a conflict among the circuits, and the relatively sparse development of the decisional law should militate against review by this Court. Indeed, the fact that the regulations have remained unchanged since 1974 and have produced no conflict among the federal circuits indicates the issue involved is probably not of great national importance, nor nearly as complicated as petitioner indicates.

There are other substantial reasons for not granting the writ. First, the factual and legal record in this case is particularly unsettled. The Eleventh Circuit has remanded the case for substantial additional factual and legal development. There has been insufficient fact-finding on the questions of the relative amounts of time EMS personnel spend performing fire protection activities, law enforcement activities, and purely emergency medical services activities. The Circuit Court has also remanded with instructions for the district court to consider (1) whether the change in petitioner's organizational structure changes the legal analysis, (2) whether the "integral part" language of 29 C.F.R. §553.210(a) presents a separate standard which must be met, and (3) whether the petitioner is entitled to a "good faith" defense. Until these issues are fully developed, this case makes a poor vehicle for fashioning national policy.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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